Impact and Linkage Fees:
What Are They, Why Can't We Impose Them, And What Can We Do Instead?

Plymouth regularly discusses the idea of charging developers a fee to defray the cost of community services such as infrastructure, schools, emergency services, etc. These charges are referred to as "impact fees" or "linkage fees". The following is an explanation of the difference between the two, the legal impediments to imposing such fees, why the state doesn't approve them for towns like Plymouth, and what we might be able to do instead.

Impact Fees vs. Linkage Fees

Plymouth often uses the terms "impact fee" and "linkage fee" interchangeably, but they are different.

There is a specific legal definition of the term "impact fee" contained in the Massachusetts General Laws. M.G.L. c. 64G, § 3D provides that:

> (a) A city or town that accepts section 3A may, by a separate vote and in the same manner of acceptance as set forth in said section 3A, impose a community impact fee of not more than 3 per cent of the total amount of rent upon each transfer of occupancy of a professionally managed unit that is located within that city or town.
>
> (b) A city or town that votes to impose a community impact fee under subsection (a) may, by a separate additional vote and in the same manner of acceptance as set forth in section 3A, also impose the community impact fee upon each transfer of occupancy of a short-term rental unit that is located within a two-family or three-family dwelling that includes the operator's primary residence.

Plymouth does impose a short-term rental community impact fee pursuant to M.G.L. c. 64G §3D(b), and in 2024 received just over $79,000 in such fees.

A linkage fee is generally defined as a fee charged by a local government on certain types of development to raise funds to offset the impacts of the development. When permitted, such fees are directed at specific purposes (such as affordable housing, job training, education, or public space enhancements like traffic and transportation improvements). So, when Plymouth talks about fees to be charged to those developing property, what it is really referring to is a "linkage fee".

Imposing Linkage Fees

The first question asked is whether Plymouth can impose a linkage fee on developers. As a general matter, Plymouth does have broad authority under its home rule powers to impose fees not otherwise inconsistent with state law. *See* Silva v. Attleboro, 354 Mass. 165 (2009). However, it may not impose a tax without state approval.

To determine whether a municipal charge is an allowable fee or an unauthorized tax there is a three-prong test established by the Supreme Judicial Court in Emerson College v. Boston, 391 Mass. 415 (1984):

1. Is the charge for a particularized service?

This means that the fee is being paid to solely to benefit the party paying the fee. Conversely, the benefits conferred by such payment are "not shared by other members of society." National Cable Television Ass'n v. United States, 415 U.S. 336, 341 (1974). "Fees are legitimate to the extent that the services for which they are imposed are sufficiently particularized as to justify distribution of the costs among a limited group (the "users," or beneficiaries, of the services), rather than the general public." Emerson College v. Boston, 391 Mass. At 425. If the charges are to pay for improvements to public property or fund municipal services, they are considered an impermissible tax rather than an allowable fee under Massachusetts law.

2. Is the charge designed to compensate the government for its costs in providing services?

This means that to be considered a fee, a charge must be to pay for specific services provided. It is not sufficient that the charge addresses a possible, even likely, expense that the municipality will incur as a result of a development, such as additional traffic or school age children. *See* Greater Franklin Developers' Association, Inc. v. Town of Franklin, 49 Mass. App. Ct. 500 (2000) (rejecting a "rational nexus" justification for the imposition of a development impact fee between additional children in a development and the need for additional school facilities). Absent a direct connection between the fee and services actually provided, such charges are considered to be efforts to raise revenue for general use and thus deemed an impermissible tax.

3. Is receipt of the service and payment of the charge voluntary?

Finally, to be considered a fee, the developer must be given a choice; either pay the fee for the service or not utilize the service and avoid the charge. Vanceburg v. FERC, 571 F.2d at 630, 644 n. 48 (D.C. Cir. 1977), *cert. denied*, 439 U.S. 818 (1978). Fees generally are charged for services voluntarily requested. *See National Cable Television Ass'n v. United States,* 415 U.S. 336, 340 (1974). While this does not preclude regulatory or inspection fees, any other type of fee imposed is considered an impermissible tax.

Accordingly, Plymouth does **not** have the authority to impose linkage fees on developers. In order to do so would require state approval through special legislation.

Legal Impediments to Seeking Linkage Fees

Even if the state were to approve a linkage fee for Plymouth, the legality of such fees has now been called into question by the U.S. Supreme Court.

In 2024, the Supreme Court issued a unanimous decision in the case of *Sheetz v. County of El Dorado*, 601 U.S. ____ (2024). In that case, the Supreme Court held that the Takings Clause under the Fifth Amendment to the United States Constitution applied to fees both administratively and legislatively imposed on landowners.

At issue was a legislatively approved traffic impact fee imposed on an individual seeking a building permit to construct a manufactured home. The amount of the fee was determined by a rate schedule based on the type and location of the proposed development. In this instance, the schedule required payment of a traffic impact fee of $23,420. The developer filed suit claiming that imposition of the impact fee violated the Takings Clause because the amount was not individually tailored to address the traffic congestion that would result from the construction of this single home.

Previously, California courts had held that land use fees imposed on individual developments must have both an "essential nexus" to the land use interest of the government, and that the fees must have "rough proportionality" to the proposed development's impacts on the government's land use interests. This is similar to the Emerson College requirements above. However, the California appellate courts had also previously stated that based on two proper U.S. Supreme Court decisions, Nollan v. California Coastal Commission, 483 U.S. 825 (1987) (Nollan) and Dolan v. City of Tigard, 512 U.S. 374 (1994) (Dolan), such limitations did not apply to linkage-type fees legislatively imposed on a broad class of property owners. Rejecting that argument, the U.S. Supreme Court held that the United States Constitution's Takings Clause, applicable to the states via the Fourteenth Amendment, does not exempt legislatures from ordinary takings rules nor give legislative actions preferential or special treatment. As such, property owners have the same protections against property rights infringement whether imposed by the legislature or municipal administrators.

While the Supreme Court chose not to decide whether or not linkage fees based on formulas or schedules for classes of development were permissible, several of the Justices issued concurring opinions which suggest a strong skepticism for such fees. As summed up by Justice Kavanaugh, "nothing in [the] Nollan, Dolan, or [Sheetz] decision[s] supports distinguishing between government actions against the many and the few any more than it supports distinguishing between legislative and administrative actions."

Based on this ruling and the related writings of the Supreme Court Justices, states will likely be hesitant to authorize new linkage fees based upon other than the cost of the direct impact of development, which would have to be empirically established.

Practical Challenges to Seeking State Approval for Linkage Fees

The reason Plymouth has wanted to impose linkage fees is to address the impact of new residential development in the community. The idea is that those constructing such new residential developments be required to pay a linkage fee to address road maintenance and improvements, additional emergency services, and expanded school needs. However, whenever the state has been asked to approve such fees, it has declined to do so.

To date, the State has only approved linkage fees for Boston, Cambridge, Chelsea, Everett, Gloucester, Somerville, and Watertown. In each instance, the allowed fees are required to go to the creation of affordable housing (with Boston and Cambridge also allowing some use toward job training). **In no instance has the state approved a linkage fee allowing monies to go towards infrastructure or municipal services**.

Notably, linkage fees have also only been approved for cities. With the exception of Gloucester[1], all of these cities are at or close to being fully built out. The state has allowed these cities to impose a linkage fee for affordable housing because there is no further room for affordable housing and new development is supplanting such housing.

Moreover, with the exception of Everett, all of these cities are allowed to impose a linkage fee only on commercial development (Everett also allows a $1,000 per unit residential fee). That is because linkage fees on residential development are considered to be anti-housing, and the state has made it clear that its top priority is creating new housing (*e.g.* the MBTA Communities Law). The governor has specifically identified the South Shore as one of the areas requiring a 7.5% to 10% increase in housing to meet demand.

To date, no town has demonstrated the same needs as these cities. As a result, towns seeking state approval for linkage fees have not been successful. The most recent town to seek such approval was Concord. In 2023, Concord proposed to be allowed to change a fee on all developments (residential and commercial) of over a certain value (to be determined by their Select Board). The funds would be placed in their Affordable Housing Trust and could be used for development of projects providing housing at up to **150% Area Median Income** (AMI). However, given that there is adequate land in Concord for new housing, no action was taken on the bill, and it terminated without action at the end of 2024.

What Can Plymouth Do?

If Plymouth can't get approval for a linkage fee, what can it do to fund critical needs without placing a greater burden on taxpayers? That is why Plymouth has proposed a Land Bank.

The proposed Plymouth Land Bank has a number of similarities to a linkage fee:

---

[1] The exception for Glouster was made in 2010 in response to the dramatic loss of revenue due to changes in federal law relating to commercial fishing.

- It is funded by a fee on the transfer of real estate, but subject to a number of exceptions.

- Funds must be used to obtain interests in land to be used for affordable housing (defined as being 60% AMI or less), open space, or future municipal needs.

- Land Bank fees do not go into the general fund but instead are placed in a a dedicated fund managed by an independent Land Bank Commission.

The intent of the Land Bank proposal is to use mechanisms which comport with legal requirements and have been previously approved by the state in a different way. It would address three critical needs in Plymouth that benefit all residents. It can also operate more efficiently by doing projects independently or in conjunction with Town, non-profit, and private entities. And by funding these critical needs through an independent source, taxpayer monies are freed up to address needs we would otherwise like to fund through a linkage fee.